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Supreme Court of the United States

OCTOBER TERM, 1955

No. 58

WILLIAM LUDWIG ULLMANN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1955
CERTIORARI GRANTED JUNE 6, 1955

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,

against

WILLIAM LUDWIG ULLMANN, APPELLANT.

APPENDIX TO APPELLANT'S BRIEF. Filed March 16, 1955

[fol. 2] IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

IN RE:

WILLIAM LUDWIG ULLMANN.

APPLICATION OF J. EDWARD LUMBARD, U. S. ATTORNEY, FOR AN ORDER REQUIRING WILLIAM LUDWIG ULLMANN TO TESTIFY BEFORE GRAND JURY

J. Edward Lumbard, United States Attorney for the Southern District of New York, hereby makes application for an order instructing William Ludwig Ullmann to testify and produce evidence, pursuant to the provision of Title 18, United States Code, Section 3486, as amended, and respectfully alleges as follows:

1. William Ludwig Ullmann was subpoenaed to appear and did appear on the 3rd day of November, 1954, before a duly constituted grand jury of the Southen District of New York sitting at New York, New York. This grand jury was then and there inquiring into matters [fol. 3] involving the interference with an endangering of, and plans and attempts to interfere with and endanger, the national security and defense of the United States by espionage, and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere.

2. The grand jury asked William Ludwig Ullmann the

following questions, among others, relating to the above matters:

Q. Mr. Ullman, the Government has information to the effect that during the years from 1941 through 1945, inclusive, various persons employed within the Government of the United States did engage in a common enterprise, having as its objective the obtaining from Government files of classified information relating to the national defense and security of the United States, and having the further objective of transmitting such information to a member or members of the Communist Party, thence to agents of a foreign power in New York City.

Do you have knowledge of such activities, sir?

Q. Did you yourself participate in such activity?

Q. Mr. Ullman, have you met a woman known as Elizabeth Bentley?

Q. To your knowledge, did Elizabeth Bentley participate in the activity which I have described to you?

Q. To your knowledge, did Elizabeth Bentley participate in such activity with you?

Q. To your knowledge, was Elizabeth Bentley a member of the Communist Party, at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Nathan Gregory Silvermaster participate in the activity which I described to you?

[fol. 4] Q. To your knowledge, did Nathan Gregory Silvermaster participate in such activity with you?

Q. To your knowledge, was Nathan Gregory Silvermaster a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Helen Silvermaster participate in the activity which I described to you previously?

Q. To your knowledge, did Helen Silvermaster participate in such activity with you?

Q. To your knowledge, was Helen Silvermaster a member of the Communist Party, at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Abraham George Silver-

man participate in the activity which I have previously described?

Q. To your knowledge, did Abraham George Silverman participate in such activity with you?

Q. To your knowledge, was Abraham George Silverman a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Harry Dexter White participate in the activity which I described to you at the outset?

Q. To your knowledge, did Harry Dexter White participate in such activity with you?

Q. To your knowledge, was Harry Dexter White a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. Had you met a person by the name of Lauchlin Currie?

Q. To your knowledge, did Lauchlin Currie participate in the activity which we have been discussing here?

[fol. 5] Q. To your knowledge, did Lauchlin Currie participate in such activity with you?

Q. To your knowledge, was Lauchlin Currie a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. Have you met a person by the name of Irvin Kaplan?

Q. To your knowledge, did Irvin Kaplan participate in this activity which I have previously mentioned to you?

Q. To your knowledge, did Irvin Kaplan participate in that activity with you?

Q. To your knowledge, was Irvin Kaplan a member of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did Harold Glasser participate in this activity which I have previously mentioned to you?

Q. To your knowledge, did Harold Glasser participate in such activity with you?

Q. To your knowledge, was Harold Glasser a mem-

ber of the Communist Party at any time during the years from 1941 through 1945, inclusive?

Q. To your knowledge, did any person or persons not named by me participate in such activity?

Q. Were you a member of the Communist Party at any time during the years from 1941 to 1945, inclusive?

Q. Mr. Ullman, did you at any time during the years from 1941 to 1945, inclusive, photograph Government documents containing information relating to the national defense and security of the United States in the basement of the residence shared by Nathan Gregory Silvermaster, Helen Silvermaster and yourself?

[fol. 6] Q. Did you at any time during the years from 1941 through 1945, inclusive, deliver to Elizabeth Bentley photographs, either developed or on undeveloped film, of Government documents containing information relating to the national defense and security of the United States?

3. ~~William~~ Ludwig Ullmann refused to answer the above questions on the ground that his answers might tend to incriminate him.

4. In my judgment as United States Attorney for the Southern District of New York, the testimony of William Ludwig Ullmann concerning the matters under inquiry and his response to the above questions are necessary to the public interest of the United States.

5. This application is made with the approval of Herbert Brownell, Jr., Attorney General of the United States. A copy of a letter from the Attorney General expressing such approval is attached hereto as Exhibit A.

Wherefore, I, J. Edward Lumbard, United States Attorney for the Southern District of New York, request the Court to order William Ludwig Ullmann to answer the above questions and to testify and produce evidence relating to the matters under inquiry, pursuant to the provisions of Title 18, U.S.C., Section 3486, as amended.

J. Edward Lumbard, United States Attorney.

Letter of Attorney General in Support of Application of U. S. Attorney.

OFFICE OF THE ATTORNEY GENERAL
Washington, D. C.

November 3, 1954.

J. Edward Lumbard, Esquire
United States Attorney
New York, New York

Dear Mr. Lumbard:

It is my understanding that on Wednesday, November 3, 1954, William Ludwig Ullmann appeared before a grand jury in the Southern District of New York which is inquiring into alleged interference with and endangering of the national security or defense of the United States by espionage and conspiracy to commit espionage. It is my further understanding that William Ludwig Ullmann refused to answer material questions on the ground of the privilege against self-incrimination afforded him by the Fifth Amendment to the Constitution of the United States.

You have informed me that it is your judgment that the testimony of William Ludwig Ullmann is necessary to the public interest. With this judgment, I am in complete accord. You are, therefore, authorized to make application to the United States District Court for the Southern District of New York for an order instructing the witness to testify and produce evidence pursuant to the provisions of the Immunity Act of 1954 (P.L. 600, C. 769, 83rd Cong. 2d Sess., Title 18, Sec. 3486, as amended).

Sincerely,

Herbert Brownell, Jr., Attorney General.

[fol. 8] In United States District Court

State of New York
County of New York
Southern District of New York, ss.:

Affidavit of J. Edward Lumbard, U. S. Attorney, Dated November 18, 1954, in Support of Application

J. Edward Lumbard, being duly sworn, deposes and says:

1. I am the United States Attorney for the Southern District of New York.

2. This affidavit is submitted in compliance with the Court's request on November 10, 1954 (Tr. pp. 67-8) and in support of my application for an order directing William Ludwig Ullmann to answer certain questions.

3. My conclusion that Mr. Ullmann's testimony is necessary to the public interest was arrived at only after long and careful consideration of all the pertinent facts in many conferences with William F. Tompkins, the Assistant Attorney General in charge of the Internal Security Division and his assistants, Mr. L. E. Broome and Mr. B. Franklin Taylor.

4. I was present before the Grand Jury on November 3, 1954 throughout the whole of Mr. Ullmann's testimony before the Grand Jury on that day.

5. This application is based on the belief that the information sought is necessary and material to the investigation now being conducted by the Grand Jury with respect [fol. 9] to espionage and related crimes in violation of the statutes set forth in the Immunity Act of August 20, 1954. It is respectfully submitted that the pursuit of investigations such as this was exactly what the Congress had in mind when it passed said Immunity Act. For these reasons it is clear that this application is made in good faith and I assert that it is made in good faith.

J. Edward Lumbard.

(Sworn to November 18, 1954.)

In United States District Court

Affidavit of William L. Ullmann, Dated November 17, 1954, in Opposition to Application of U.S. Attorney

William L. Ullmann, being duly sworn, deposes and says:

I make this affidavit in opposition to the application by the Government to the Court for an order granting me immunity.

In the memorandum being submitted to the Court together with this affidavit, my attorneys present all the legal arguments in opposition to the Government's application. This affidavit is submitted in support of only one of these points, to wit, if the immunity statute is constitutional, then this is a case in which the Court should none the less exercise its discretion by denying the Govern- [fol. 10] ment's application for an immunity order (Point 5) in the memorandum on my behalf).

This affidavit sets forth my experiences with the investigatory and prosecuting agents of the Department of Justice and with Congressional investigating committees during the seven and a half year period beginning in April, 1947. I also set forth other relevant information from Congressional committee hearings and other public records. These facts show that if I deny the charges against me the Government, particularly the Department of Justice, will not be satisfied without trying to indict me for perjury if it is unable to support an indictment against me for espionage or for conspiracy to commit it.

I am not suggesting that if I lie to the Grand Jury I should not suffer the normal consequences. What I do say, however, is that the Department of Justice (and Congressional committees) are so unequivocally on record as to my guilt that the Government has left itself no alternative except to seek my indictment for perjury if I assert my innocence.

The answer to this might be that these are risks that any accused person faces under our system, be he innocent or guilty. This may be a sufficient answer in the normal case. But the difference is that in the ordinary case the Government investigates the charges with something of

an open mind; at least, the chief prosecuting officers do not before indictment normally announce that there is not the slightest doubt of the guilt of the accused. In my case, however, the Government has put itself on record, on occasions attended with publicity of a sensational character, that the charges against me are true. This is why I say that the Government cannot be satisfied with anything else except either my admission of the substantive charges or a prosecution against me for perjury.

[fol. 11] If this is so, then one of the alternatives which should be open to me if the Court does grant me immunity will actually be a trap rather than a true alternative. In other words, if I deny the accusations against me, the Government has put itself in a position where it must use every means at its command to prove I have perjured myself. If it is unable to do so on a major question, it will try to do so on a minor or related one. If it is unable to do so on a minor or related question, it will try to do so on a tangential or unrelated one. To put it another way, the Department of Justice has put itself in such a position, both as the prosecutory agency of the Government and also from the standpoint of partisan politics, that it must use all means at its command to support the charges against me or to have me convicted of perjury for one thing or another.

The Charges By Miss Elizabeth Bentley—The questions put to me before the Grand Jury on November 3, 1954 which are contained in the application of the United States Attorney grow out of testimony and statements made by one Elizabeth Bentley. These questions indicate the essence of Miss Bentley's accusations against me, to wit, that during the wartime period, 1941-1945, I was a member of an espionage "ring" in Washington, composed of Government employes or officials, which was headed by N. Gregory Silvermaster and which included Harry White and Lauchlin Currie among several others; that the persons in the group, including myself, were members of the Communist Party; that "classified information relating to the national defense and security of the United States" (paragraph 2 of the application) was obtained by members of the group from Government files and turned over to Miss Bentley to be turned over by her in turn "to agents of a foreign power" (ibid.).

[fol. 121] Before I relate what took place on April 15, 1947, when I was interrogated by agents of the F.B.I., I should explain that I first learned of Miss Bentley's charges on July 31, 1948 when she made her initial public appearance as a witness before the House Committee on Un-American Activities (80th Cong., 2nd Sess., *Hearings Regarding Communist Espionage in the United States Government*). I also learned then that Miss Bentley had been in touch with the F.B.I. since 1945. Therefore, I was not yet aware, in April, 1947, of the fact that Miss Bentley had theretofore been in contact with the F.B.I.[1]

A brief chronological outline of the eight occasions on which I have been questioned about Miss Bentley's charges (and other matters) may assist the Court in following the thread of my narrative. Except for my interrogation by agents of the F.B.I. in April, 1947, I was questioned on the seven other occasions pursuant to subpoena:

1. Interrogation by agents of the F.B.I. on April 15, 1947.

2. *November, 1947*—Before a Grand Jury in this district.

3. *August 10, 1948*—At a public hearing of the House Committee on Un-American Activities in Washington. (These were the same hearings in which Miss Bentley gave her initial public testimony on July 31 and on August 4, August 9, August 10, and August 11, 1948.)

[fol. 434] 4. *October, 1953*—At an executive session of the Senate Subcommittee on Investigations (the so-called McCarthy Committee) in New York.

5. *October 21, 1953*—At a public hearing of the Subcommittee on Government Operations Abroad Of The Senate Subcommittee on Investigations in Washington.

6. *December 2, 1953*—At a public hearing of the Subcommittee To Investigate The Administration of the Internal

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[1] Since July, 1948, Miss Bentley has testified before Congressional committees on other occasions and has also been a witness in several trials. It is also public knowledge that she has also testified before Grand Juries from time to time. In addition, she has written a book and magazine and newspaper articles, and has been interviewed frequently in the press and on radio and television.

Security Laws (the so-called Jenner Committee) in Washington.

7. *October 25, 1954*—Before a Grand Jury in Washington, D. C.

8. *November 3 and November 8, 1954*—Before the present Grand Jury.

I should also state at this point that I was employed in the Government from the Spring of 1935 until March, 1947, at which time I voluntarily resigned from my position as economic analyst in the Treasury Department. My first government employment was with the National Industrial Recovery Administration. I was then with the Farm Security Administration of the Department of Agriculture, and beginning in 1939 I was in the Treasury Department until March, 1947, except for a three-year period in the Army from 1942 to 1945.

My Interrogation By Agents Of The F.B.I. On April 15, 1947—Following my resignation from the Treasury, I continued to reside at 5515 30 Street, N.W., in Washington, where I had made my home since 1938 with Mr. Silvermaster and his wife, Helen. (I should explain that I am unmarried.)

[fol. 14] On April 15, 1947, about a month after I had left the Treasury, two agents of the Federal Bureau of Investigation came to my home at about 5:30 p.m. I made no memorandum at the time of the following details, so I am stating my best recollection after seven and a half years. Aside from that, I assume that the records of the F.B.I. will show what happened on that date, and although I would not want to concede now the completeness or accuracy of such records, I would be willing to have such records disclosed to the Court.

The agents identified themselves as Agents Wildeman (I am uncertain of the spelling) and Mossberg. They stated that they had a very confidential matter concerning another person to discuss with me. Although I said I preferred to talk to them at my home, they prevailed upon me to go with them to F.B.I. headquarters where, they said, they had a group of files they could refer to. When I told them that I had not yet had dinner, they assured me that they would have some food sent in to their offices.

The agents drove me to the offices of the F.B.I., where I was questioned behind locked doors until the same agents drove me home at about 11:30 p.m. During the questioning, there were always two agents present. However, a total of five agents actually participated because at one point Mr. Mossberg was replaced by an agent by the name of Taylor; later, Mr. Taylor was succeeded by a fourth agent; at a still later point, the fourth agent was succeeded by a fifth, who left when Mr. Mossberg returned to the room towards the end of the questioning. (I do not have the names of the fourth and fifth agents.)

I am prepared at any time to testify in detail about the character of the questioning and the insults and threats [fol. 15] which went with it, but I merely summarize here so as not to burden this affidavit unduly. I was asked the questions about espionage which were based on what I later learned, in 1948 as I have said, were Miss Bentley's charges. When I answered such questions in the negative, the agents accused me of lying, as they did also from time to time when I denied that I knew that this or that friend or acquaintance or Government associate of mine was a "red," and when I made other denials. I was asked such questions, for example, about the Silvermasters, about Harry White, about Lauchlin Currie, about Colonel Bernard Bernstein, and about a number of other persons.

The agents left no doubt that they were firmly convinced of my guilt. As I have said, they kept accusing me of lying. They told me at one point that I was "lucky" that the questioning was not taking place in a "red" country where, because of the denials I was making, my arm would already have been broken. They knew about my "good staunch" American parents in Missouri and that I would "hate" to see anything happen to them. They also knew that I would "hate" to see anything happen to my sister in New York.

The agents reminded me that I was "good American stock—not foreign riff-raff that came over on a crummy boat a few years ago"; I was not a "smelly foreigner." They told me that they would protect me if the Silvermasters were threatening my life, and that if I "co-operated," I could earn (in fact, they could almost "guarantee" it) large sums from writings, movies, lecture tours, etc. Their

parting words, when they left me at my home, were that they would see me in court.

My Appearance Before The Grand Jury In This District, In November, 1947—When I was served with a subpoena for this appearance, I consulted counsel and was advised of [fol. 16] my constitutional rights before I appeared. In my appearance before the Grand Jury, I therefore exercised my privilege under the Fifth Amendment to refuse to answer questions.

My Appearance Before the House Committee On Un-American Activities In Washington On August 10, 1948—Despite the fact that I knew I could also claim my privilege on this occasion, I answered many questions when I appeared before the Committee, particularly denying the basic charges made by Miss Bentley, but I still claimed my privilege with respect to questions about my political beliefs and affiliations and also questions which seemed designed to entrap me on subsidiary or minor or unrelated questions of fact.

Despite the obvious risks involved, I denied Miss Bentley's charges on this occasion because these hearings were attended by the most flamboyant and widespread publicity. I concluded that if I claimed my privilege to its fullest extent, my position would be misinterpreted by people generally because of the widespread notion that a claim of the privilege amounts to an admission of guilt.

In a prepared statement to the Committee I said, and repeated on the stand, that Miss Bentley's charges against me were false (80th Cong., 2d Sess., *Hearings Regarding Communist Espionage in the United States Government*, pp. 765, 774-775). In my prepared statement, I said:

> "The scurrilous charges made against me by Miss Bentley before this committee are false. I state categorically that she is a liar. I am and always have been a loyal American citizen. I never have betrayed any confidence reposed in me by my Government. I am not and never have been a spy or an agent of a foreign government. I have never photographed any Government documents." (p. 768)

[fol. 17] On the stand, I reiterated that I had never photographed any Government documents (p. 765) and that I had never turned any Government documents over to Mr. Silvermaster or to Miss Bentley or to anyone else (pp. 765-766). Despite these denials, the members of the Committee demonstrated by their questions, their statements, and their attitudes that they were convinced of my guilt.

These sworn answers in August, 1948, take on a peculiar significance in light of the disclosures made in November, 1953, more than five years later,[2] in testimony by the Attorney General and J. Edgar Hoover that, as early as November 7, 1945, the latter had already concluded that I and others were guilty and had advised the White House to that effect at that time. I will discuss that testimony at a later point in this affidavit, but here I direct attention to the fact that if Mr. Hoover had evidence enough of my guilt to so advise the White House in November, 1945, then he would have had at least as much evidence in April, 1947, when I denied Miss Bentley's charges to the F.B.I., and in August, 1948, when I denied the charges under oath to the House Committee. Yet despite the fact that the evidence against me was not presented in a court of law in November, 1945, or April, 1947, or August, 1948, Mr. Brownell and Mr. Hoover were still asserting my guilt in 1953, eight years after the latter originally put such an assertion in writing.

My Two Appearances Before The McCarthy Committee in October, 1953—The significance of my appearance before [fol. 18] Senator McCarthy in the executive session in New York is that it demonstrates how a person who is once accused in this area, like myself, is dragged by compulsory process into irrelevant or unrelated subjects and is made a whipping boy for whatever political or other purposes may

[2] It is true that quotations of that material and references to it had been made by Vice-President Nixon in 1950 and during the Presidential campaign in 1952, and that it had also been referred to during earlier hearings before the Jenner Committee in 1953 (Hearings, April 14, pp. 71-73). But the exact character of the material was not made fully clear, as far as I know, until the Attorney General and Mr. Hoover testified in November, 1953.

be served at the moment. In this instance, it was in the course of Senator McCarthy's investigation of "espionage" at Fort Monmouth that I was subpoenaed to testify, for no other reason that I could deduce than that I have been living in New Jersey since 1947, even if my home is miles from Fort Monmouth. I was interrogated about a host of people whose names meant nothing to me—as I swore under oath—and that was that. But not before Senator McCarthy and his staff gave me to understand that I was guilty of something or other.

My appearance on October 21, 1953, before a public hearing of Senator Mundt's Subcommittee of the McCarthy Committee (83rd Cong., 1st Sess., *Hearings Regarding Transfer Of Occupation Currency Plates—Espionage Phase*) illustrates how charges like Miss Bentley's have a way of expanding over the months and years, so that as soon as one set is denied or goes unanswered by the claim of privilege, another set confronts the accused. Only at about the time Mr. Mundt opened these hearings did I learn that Miss Bentley was accusing me (and others) of attempting to help her secure samples of American occupation currency during the war so that the Russians could counterfeit them.

This hearing, like the earlier one that month before Senator McCarthy, illustrates that if I am directed to answer questions before the Grand Jury, the process would be endless. Here I was asked about a certain matter for the first time. This process of introducing new charges could go on for years.

[fol. 19] Aside from this, the following statement made by Senator Mundt at the conclusion of these hearings also shows the extent to which my guilt had been pre-determined by Congressional committees as well as by the Department of Justice:

> "It seems to me we have a very clear-cut case here that offers no argument in the refutation, that while the Russian Government was operating diplomatically, and I might say successfully, to induce our Government to make a loan of its monetary plates to the Russians, they had the people whose names have been written into the record, on whom the evidence is clear by the

Communist functionary who had them under discipline, and by their failing to use an opportunity provided by this committee to deny these serious charges, the evidence is clear that Russia, while an ally of ours in the war, was using this over-and-under technique to obtain its objectives. In this particular instance the ultimate decision was made aboveboard. It is pretty clear that directives given by Miss Bentley to these high functionaries in the Treasury Department, including Mr. White, aided to a considerable degree in achieving the results that they desired after their stealing of the monetary samples failed to give them the proper type of material with which to counterfeit the notes which were being used.

"As the Chair announced at the beginning of these hearings, it was the specific purpose of this phase of the hearing to determine whether or not that over-and-under tactic was actually being employed. We have picked up bits of evidence here and there to that end: [fol. 20] "It seems clear, and stands without any argument against it, any refutation from any of the parties involved, that this apparatus was functioning in the manner which has been outlined." (p. 43)

My Appearance Before the Jenner Committee On December 2, 1953—These particular hearings (83rd Cong., 1st Sess., *Hearings On Interlocking Subversion In Government Departments*, Part 16) are the ones which were precipitated by the speech made by Attorney General Brownell in Chicago on November 6, 1953, in which he attacked President Truman's handling of the so-called Harry Dexter White case. It is worth noting that of all the accused persons named by Messrs. Brownell and Hoover, I was the only one subpoenaed to testify during the course of these particular hearings, but this may have been because all or most of the others still alive had already testified in the earlier 1953 hearings on this subject before the Committee.

Before I come to the testimony of the Attorney General and of Mr. Hoover in November, 1953, I should say that the Jenner Committee had already made a report on July 30, 1953 entitled, "*Interlocking Subversion in Government De-*

partments" (83rd Cong., 1st Sess.) in which I was named as one of those guilty of espionage (pp. 2, 17-18, 29). In addition, Mr. Jenner opened these hearings on November 12, 1953 by repeating for the record that the evidence before the Committee showed that myself and others "were implicated in the Communist underground organization directed by Soviet superiors" (p. 1069; pp. 1069-70).

When Mr. Brownell testified, he announced that he had "declassified" a "top secret" letter dated November 8, 1945 from J. Edgar Hoover to Brigadier-General Harry Hawkins-Vaughan, Military Aide to President Truman, and then went on to read the letter into the record (pp. 1113-1114). [fol. 21] In this letter, Mr. Hoover advised Gen. Vaughan that information in the possession of the F.B.I. indicated that Harry White, Lauchlin Currie, and I and others were members of a "ring" which had been turning over data to persons outside the Government to be transmitted to Soviet espionage agents.

Apparently, this letter of November 8, 1945, was the original communication from the F.B.I. of any kind relating to Miss Bentley's charges. However, Mr. Hoover testified that from November 8, 1945 to July 24, 1946, seven communications bearing on espionage activities, wherein Harry White's name was mentioned; went to the White House, and that during the same period, two summaries on Soviet espionage activities went to the Treasury Department and six to the Attorney General (p. 1144). Since a later letter to Gen. Vaughan (p. 1115), dated February 1, 1946, also mentions me in connection with Harry White, and since Mr. White's name has almost always been linked to mine by Miss Bentley, it may be assumed that my name was mentioned in all or in most of the other communications and summaries to which Mr. Hoover referred.

Aside from the fact that Mr. Hoover had made flat statements concerning my guilt in the letters of November 8, 1945 and February 1, 1946, both he and Mr. Brownell also testified independently when they appeared before the Jenner Committee in November, 1953, that I and others were guilty. Mr. Brownell said, for example, that "the basic facts" of the "ring" of which Miss Bentley had said I was a member (and of another "ring") had been "well

established by previous court procedures and by congressional committees" (p. 1142).

As far as congressional committees are concerned, and aside from the fact that under our system the courts and [fol. 22] not the Congress pass on guilt or innocence, Miss Bentley is the only person, as far as I know, who has given such testimony about me. As far as "court procedures" go, Miss Bentley's charges against me have of course never been tried in court.

At other points in his testimony, the Attorney General also referred to me as if there were no doubt of my guilt (pp. 1116-1117, 1119). The following paragraph from his testimony, referring to the report attached to the letter of February 1, 1946 to Gen. Vaughan, illustrates his attitude as well as his logic:

> "The report contains much corroborative evidence which cannot be made public either because it would disclose investigative techniques of the FBI or because it might be harmful to the national interest. It can be pointed out, however, that over a period of 3 months beginning in November of 1945 the activities of Harry Dexter White were entirely consistent with all the previous information contained in the report. White was in frequent close personal contact with nearly every one of the persons named as his associates in the spy ring. These include Nathan Gregory Silvermaster and his wife, William Ullmann, Sonia Gold, Harry Glasser, Abraham Silverman, and others." (p. 1118)

Mr. Brownell neglected to say that during the "3 months beginning in November of 1945," Mr. White and I were associates in the Treasury Department. If he had, then evidence that we had been "in frequent close personal contact" would not seem so conclusive.

I am not arguing the merits of this "evidence." My attorneys have made it quite clear to me, and I understand, that that is irrelevant at this juncture. I cite this state- [fol. 23] ment only to show the lengths to which the Attorney General is prepared to go to find support for Miss Bentley's charges.

If this were merely another criminal matter in which the prosecutor had staked his prestige on the outcome, an attitude like the Attorney General's would be serious enough. But particularly because of the sensational partisan furor touched off by Mr. Brownell's speech of November 6, 1953 and the violent political passions generated by the Jenner Committee hearings, Mr. Brownell is committed to his position not only because he is the Government's chief law officer, but also because he has been or has made himself the Administration's chief political spokesman on this subject.

I understand that a discussion of the political aspects of this case is irrelevant as such, but it is none the less pertinent to observe that, be I innocent or guilty, the Attorney General must now use me as a pawn in a game being played for the highest political stakes. If he is unable to have me convicted for espionage, he must try to have me convicted for perjury. Whether or not I have immunity against the former, it seems to me that this is a situation which calls for the application of the literal language of the Fifth Amendment. In other words, this is peculiarly a case where if I am ordered to answer questions, I shall be compelled to be a witness against myself. This is a case where, if the Court does have discretion, it should be exercised to protect a citizen from both of the undesirable alternatives which the Government seeks to impose on him.

As far as Mr. Hoover's testimony is concerned (pp. 1142-1150), it suffices to say that he was even more positive about Miss Bentley's charges than was Mr. Brownell. He too stated that "her testimony has been evaluated by juries and reviewed by the courts and has been found to be ac- [fol. 24] curate" (p. 1145). Such a statement can mean only that Mr. Hoover's unique and extraordinary prestige is also at stake in this matter.

My Appearance Before Grand Juries In Washington On October 25, 1954 And In This District On November 3 and November 8—I should say that before I was subpoenaed to appear before the Grand Jury in Washington, I knew from the press that such a Grand Jury as well as one in Camden, New Jersey, were taking testimony concerning Miss Bentley's charges. I mention this because the press stories relating to this development were particularly detailed and

circumstantial and stated openly or by clear implication that the information in the stories came from sources in the Justice Department (See, e.g., *The Washington Evening Star*, Sept. 15, 1954, p. 1, "*Drive Mapped Against Spies Of World War II*"; *The New York Times*, Sept. 17, 1954, p. 1, "*Grand Juries Get Spy Mop-Up Cases Under New Law*"). As the very title of the story in *The Times* shows, that story as well as the others gave particular emphasis to the new immunity law. Among other details, these stories mentioned my name as well as those of other persons.

Not unrelated to such press stories is the speech made by Assistant Attorney General William F. Tompkins, chief of the recently created Internal Security Division in the Department of Justice, to the Camden County Bar Association on September 28 (New Jersey Law Journal, October 7, p. 1) during the period the Grand Jury was sitting in Camden. In this speech, Mr. Tompkins said:

> "The Silvermaster-Perlo espionage groups which operated in war-time Washington were engaged in the worst kind of informing which can be imagined—that of divulging information of the United States to the Soviets." (p. 6).

[fol. 25] Like Messrs. Brownell and Hoover, Mr. Tompkins, who I assume is directly in charge of the presentation of the evidence in this matter to the current Grand Juries, has no hesitation in announcing my guilt, and no hesitation in doing so before a bar association while the Grand Juries are still sitting and in a city where one of the Grand Juries itself is in session.

When I appeared before the Grand Jury in Washington on October 25, I claimed my privilege under the Fifth Amendment. But I think this Court should know that two of the attorneys for the Justice Department, a Mr. Nicholson and Mr. Lafayette Broome, returned to one of the themes employed by the F.B.I. agents in their interrogation of me on April 15, 1947. This is the subject of my national and religious background and my German-American antecedents. Mr. Nicholson asked me to give the Grand Jury my religious affiliations. When I did not answer, he did say that I need not do so if I preferred. I said I

preferred not. Mr. Broome then asked me if I had *any* religious affiliations, but he also assured me that I need not answer and I did not. Mr. Broome also spoke at some length about the contributions made by the German-Americans in Missouri and appealed to my "sturdy" background for cooperation with the Government. The other themes employed by the F.B.I. in April, 1947 were also employed here, although not so blatantly. Had the stories about me distressed my father (who died in 1953)? My mother? My sister? Had I been threatened physically if I did answer questions? Had I suffered from the publicity I had received?

The Court may also be interested in the fact that on Thursday, October 21, The Washington Evening Star carried a story that I had been subpoenaed to appear before the Grand Jury the following Monday, October 25 [fol. 26] (p. A-34, "*Espionage Probers Subpoena Ullmann, Ex-Treasury Aide*"). This story reviewed Miss Bentley's charges and quoted from a Congressional committee report. It also stated that Justice Department "spokesmen" had confirmed an earlier story that, "armed with the new witness immunity law", "a fresh effort to obtain indictments in wartime espionage cases would be made by the department."

I have asked my attorneys if they can explain to me why I was subpoenaed before a Grand Jury in New York after I had already appeared before the one in Washington only the week before. They say they are unable to explain this, but they do say that the Government has the power to do so. I have asked them whether it is within the power of this Court to examine the transcript of my testimony before the Washington Grand Jury, and they say it is. If this is so I respectfully request that this Court do so before passing on the pending application.

Since the matter now before the Court grows out of my appearances before the Grand Jury in this Court on November 3 and November 8, it is unnecessary for me to comment thereon even if it were appropriate.[3]

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[3] I should also bring to the attention of the Court an Associated Press dispatch in the *New York Herald Tribune* for this past Sunday (November 14, 1st Section, p. 19)

Conclusion—As I said at the beginning of this affidavit, the foregoing facts show that an immunity order of this [fol. 27] Court will not give me one of the alternatives I should have, that of answering the questions in the negative. If the Court were to direct me to answer by an order of the kind for which the Government has applied, but if the basic questions relating to Miss Bentley's charges and only those questions were then put to me in the Grand Jury room, perhaps the attitude of Messrs. Brownell, Hoover and Tompkins (not to mention Senators Jenner and Mundt and their colleagues in the House and Senate) as to my guilt would have no special significance.

However, the foregoing facts, and what has happened in other cases, shows that these questions would only be the beginning. I might be asked again about this or that person who is or was employed at Forth Monmouth; I might be asked again about the matter of the occupation currency. A negative answer to the question relating to my alleged Communist Party membership, for example, would merely open the door, as the Remington and Lattimore cases illustrate particularly. What about the membership of Silvermaster, White, and the others? Did I contribute to this or that cause? What was my position on this or that question? In 1953? In 1945? In 1939? How often did I lunch with this person, how often did I visit with that one, and what did I say and what did they say? Do I read this, did I read that?

I do not wish to extend this affidavit by illustrations which could be multiplied a hundred-fold and which would all find precedent in the trials, the Congressional hearings,

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entitled "*Brownell Starts First Case Under Spy Immunity Law*". The dispatch is date-lined from Washington, November 13, and the story is attributed to "Justice Department officials". Although neither my name nor this Court is mentioned, the story obviously relates to this case. (The same dispatch, with minor and irrelevant editorial changes, also appeared on the same day in the *New York Times*.) The story refers to a Grand Jury in San Francisco as well as to those in Washington and Camden, but not to the one sitting in this Court.

the investigations, and the Oppenheimer and other "loyalty" cases of the period.

In view of these facts, I believe that an order directing me to testify will give the prosecutors a merciless trap with which to ensnare me.

[fol. 28] This is a case in which I believe that I am entitled to the full protection of the Fifth Amendment, immunity law or no immunity law.

William L. Ullmann.

(Sworn to November 17, 1954.)

In United States District Court

Affidavit of Edward L. Grampp, Dated December 1, 1954, in Support of Application.

City of Washington
District of Columbia, ss.:

Edward L. Grampp, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation.

2. I have been shown an affidavit of William Ludwig Ullmann, dated November 17, 1954, relating in part to an interview with Mr. Ullmann conducted by Special Agents of the Federal Bureau of Investigation on April 15, 1947.

3. I did not participate in the interview. However, shortly after 10:00 p.m., I was informed that the interview with Mr. Ullmann had been completed. I was asked to accompany Special Agent E. Hyatt Mossburg while he [fol. 29] drove Mr. Ullmann back to the latter's residence. I did so. Mr. Ullmann was driven to the residence at 5515 30th Street, N.W., in the District of Columbia, which he shared with Nathan Gregory Silvermaster and Helen Silvermaster. The trip was made without incident, and Mr. Ullmann left the automobile at approximately 10:35 or 10:40 p.m.

4. Mr. Ullmann was not told by either Special Agent

Mossburg or myself that we would see him in court, as he states in his affidavit.

Edward L. Grampp.

(Sworn to December 1, 1954.)

In United States District Court

Affidavit of Maurice A. Taylor, Dated December 1, 1954, in Support of Application.

City of Washington
District of Columbia, ss:

Maurice A. Taylor, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation.

2. I have been shown an affidavit of William Ludwig Ullmann, dated November 17, 1954, relating in part to an [fol. 30] interview with him conducted by Special Agents of the Federal Bureau of Investigation on April 15, 1947. My participation in and knowledge of that interview is hereafter described.

3. At 9:30 p.m. on April 15, 1947, I was in Room 1511 of the Washington Field Office of the Federal Bureau of Investigation, then located in the Department of Justice on Pennsylvania Avenue between 9th and 10th Streets, N.W., Washington, D.C., when Special Agent H. Hyatt Mossburg emerged from the adjoining room. He told me that he and Special Agent Wildman had completed their interview with Mr. Ullmann, and asked me if I wished to ask him any questions.

4. I entered the room where Special Agent Wildman and Mr. Ullmann were seated and talked with Mr. Ullmann for approximately twenty or twenty-five minutes, leaving shortly before 10:00 p.m. While I was interviewing Mr. Ullmann, the only other person in the room was Special Agent Wildman.

5. On page 7 of his affidavit, Mr. Ullmann makes certain allegations concerning the interview about which I should like to comment: Of course, my participation was confined

to the relatively brief period from shortly after 9:30 p.m. to shortly before 10:00 p.m. My personal knowledge is limited to what transpired during that period, and the following statements are intended to be so limited.

6. I have no recollection of using the word "lying" when questioning Mr. Ullmann, nor of hearing that word used. However, many of Mr. Ullmann's denials were contrary to information in our possession and were not believed. That fact was made known to him.

[fol. 31] 7. I have no recollection of using the word "red" in my questioning of Mr. Ullmann, nor of hearing that term used. The terms "Communist" or "Communist sympathizer" were used, however.

8. There was no statement made in my presence to the effect that were Mr. Ullmann's denials made in a "'red' country" his "arm would already have been broken." There was nothing said about an arm being broken.

9. In an effort to persuade Mr. Ullmann to cooperate with us and give us the benefit of knowledge which we had reason to believe he possessed, I referred to the fact that he came from a substantial, midwestern family and that he had deep roots in this country and attempted to appeal to a sense of family loyalty and to a sense of loyalty to his country. At no time was it suggested that anything might happen, or that we should "hate" to see anything happen, to his parents in Missouri or to his sister in New York. At no time was Mr. Ullmann told that he was "not foreign riff-raff that came over on a crummy boat a few days ago" or that he was not "a smelly foreigner." Such language was not used while I was present.

10. At no time while I was present, was anything said to Mr. Ullmann about his being able to earn "large sums from writings, movies, lecture tours, etc."

11. While I was present, the interview with Mr. Ullmann was carried on in normal, conversational tones. He was treated courteously. Certainly no threats were made. Although he appeared to be quite nervous, at no time did he protest his treatment or indicate a desire to leave.

Maurice A. Taylor.

(Sworn to December 1, 1954.)

AFFIDAVIT OF E. HYATT MOSSBURG, DATED DECEMBER 1, 1954, IN SUPPORT OF APPLICATION.

CITY OF WASHINGTON
District of Columbia, ss.:

E. Hyatt Mossburg, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation.

2. I have been shown an affidavit of William Ludwig Ullmann, dated November 17, 1954, relating in part to an interview with Mr. Ullmann conducted by Special Agents of the Federal Bureau of Investigation on April 15, 1947. My recollection of that interview is set forth herein.

3. At approximately 6:20 p.m. on April 15, 1947, Special Agent Lorenzo Wildman and I presented ourselves at the residence shared by Mr. Ullmann and Nathan Gregory Silvermaster and his wife Helen Silvermaster at 3515 30th Street, N.W., in Washington, D. C. We asked Mr. Ullmann to come with us to the Washington Field Office of the Federal Bureau of Investigation, then located in the Department of Justice on Pennsylvania Avenue between 9th and 10th Streets, N.W., in Washington, in order to discuss a matter of vital concern to the United States Government. Mr. Ullmann remarked that he hadn't eaten and we told him that we could have food brought to the office. He accompanied us, apparently willingly, to our automobile and we drove to the Department of Justice.

[fol. 33] 4. The interview was conducted in Room 1513 at the Department of Justice. It began at approximately 7:00 p. m. I was present until approximately 9:30 p. m. At that time, Special Agent Wildman and I had concluded our questioning of Mr. Ullmann and I stepped into an adjoining room. There I encountered Special Agent Maurice Taylor. As he had a wide familiarity with the entire case, I informed him that we were through with the interview and asked him if he'd like to question Mr. Ullmann further. Special Agent Taylor thereupon entered the room with Mr. Ullmann and Special Agent Wildman while I remained behind.

5. Special Agent Taylor came out of the interview room at approximately 10:00 p. m. I re-entered. Within a very few minutes, Mr. Ullmann and I left the office. While Special Agent Wildman remained behind, Special Agent Edward L. Grampp joined Mr. Ullmann and myself. We drove Mr. Ullmann back to his residence leaving him there at approximately 10:35 or 10:40 p. m.

6. From 7:00 p. m. until 9:30 p. m., the entire period of my participation in the interview, the only persons in the room with Mr. Ullmann were Special Agent Wildman and myself.

7. At the outset, Special Agent Wildman explained to Mr. Ullmann that he need not respond to our questions and that anything he might say could be used against him. The purpose of the interview was to seek information and to give Mr. Ullmann an opportunity to explain various information in our possession tending to indicate that he and others associated with him had engaged in espionage.

8. To my certain knowledge, we offered to send out for sandwiches and a beverage on at least two occasions. [fol. 34] Mr. Ullman's response was that he preferred to wait until he returned to his residence to eat. Water was available at all times in a decanter on the desk and was offered to him.

9. The interview was conducted in a conversational tone. No threats were made. Neither were loud voices nor threatening gestures used. The door leading from the room to the corridor was equipped with a lock which, when engaged prevented entry from the corridor, but the door could be opened from inside the room merely by turning the handle. Thus, from the position of one in the room, the door was not, and could not be, locked. The lock was engaged for the sole purpose of preventing interruptions. At no time was Mr. Ullmann prevented from leaving nor was he told that he could not leave. He appeared very nervous throughout the interview, but at no time did he express a desire to terminate the interview and depart.

10. The affidavit of Mr. Ullmann makes certain allegations to which I should like to address myself. The observations which I make hereafter are confined to those periods

of time when I was present, that is, the entire time except for the interval between the approximate times of 9:30 p. m. and 10:00 p. m.

11. On page 7 of his affidavit, Mr. Ullmann creates the impression that he was constantly accused of lying. If that is the impression he intends to convey, I wish to state that it is not true. I have no recollection of either Special Agent Wildman or myself using the words "lying" or "liar." There were certainly occasions during the course of the interview when Mr. Ullmann's denials were not believed. There were occasions when he was informed in so many words that there was reason to believe that certain things were true despite his denials.

[fol. 35] 12. I have no recollection of the term "red" being used, either with reference to associates of Mr. Ullmann or with reference to another country. The term is not one which I am in the habit of using when referring to Communist associations. Such terms as "Communist" and "Communist sympathizer" were employed in our questioning of Mr. Ullmann.

13. There was nothing said to the effect that were Mr. Ullmann's denials made in a "'red' country", his "arm would already have been broken." Nothing was said about an arm being broken, and no threats of any sort were made.

14. While I was present, nothing was said to the effect that we would "hate" to see anything happen to his parents or to his sister. If it is Mr. Ullmann's intention to imply that a veiled threat was made concerning the safety of his family, I wish to state categorically that no such threat was made, veiled or otherwise.

15. Language such as "foreign riff-raff that came over on a crummy boat a few years ago" and "smelly foreigner" was not employed while I was present.

16. No hope of reward in the form of "large sums from writings, movies, lecture tours, etc." was held out to Mr. Ullmann. Nothing was said even remotely resembling that statement.

17. As I stated above, Mr. Ullmann was driven to his residence at the conclusion of the interview by Special Agent Grampp and myself. He was not told by either

Agent Grampp or myself that we would see him in court, as he alleges.

E. Hyatt Mossburg

(Sworn to December 1, 1954.)

[fol. 36] In United States District Court, Southern District of New York

Appearances:

J. Edward Lumbard, United States Attorney, Attorney for United States of America, L. E. Broome, B. Franklin Taylor, John H. Davitt, Special Assistants to the Attorney General, Of Counsel.

Nathan Witt, 9 East 40th Street, New York 16, N. Y.
Leonard B. Boudin, 25 Broad Street, New York 4, N. Y.,
Attorneys for Respondent.

Opinion—February 8, 1955

Edward Weinfeld, D. J.

This is the first proceeding involving the immunity statute passed at the last session of the Congress.[1] The United States Attorney has presented to this Court an application for an order directing William Ludwig Ullman to answer before a grand jury questions which he has heretofore refused to answer, upon the assertion of his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. The application sets forth that the grand jury was inquiring into matters involving interference with and endangering of the national security and defense of the United States by espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere. [fol. 37] The petition further avers that in the judgment of the United States Attorney the testimony of the aforesaid William Ludwig Ullman is necessary in the public inter-

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[1] Public Law 600, 83rd Cong.; 68 Stat. 83; 18 U. S. C. § 3486.

est and that the application is made with the approval of the Attorney General, whose letter of approval is attached.

The statute in question provides a procedure in investigations and cases involving the national defense or security whereby a witness, having asserted his constitutional privilege against self incrimination, may be compelled to testify in return for immunity from future prosecution as to any matter concerning which his testimony is so compelled. The act provides for a grant of immunity in two separate and distinct categories, one, in investigations before the Congress or its authorized committees and, the other, in any proceeding or case before grand juries or courts of the United States. We are here concerned only with that part of the statute relating to witnesses before grand juries and courts. So far as pertinent, the statute provides:

. . . . . .

"(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987, violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of section 212(a) [fol. 38] (27), (28), (29) or 241(a) (6), (7) or 313(a) of the Immigration and Nationality Act (66 Stat. 182-186; 204-206; 240-241), and conspiracies involving any of the foregoing, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the

ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted, or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court."[2]

The witness opposes the application upon various grounds. He urges that (1) the statute is unconstitutional and in contravention of his rights under the Fifth Amendment by requiring him "to be a witness against himself"; (2) the statute is invalid in that the grant of immunity is not sufficiently protective to compensate for his privilege against self-incrimination; (3) assuming arguendo the statute does grant full immunity, it is invalid in that the court is called upon to perform a non-judicial function; (4) further, assuming it is valid, the application fails to set forth facts establishing that it is in the public interest to grant immunity; (5) certain of the questions as to which the [fol. 39] application is made are improper even under a valid-immunity statute.

With respect to the first ground, the witness recognizing that the power of Congress to enact immunity statutes has been upheld in and since Brown v. Walker,[3] cites the dissenting opinions in that case and urges reconsideration in the light of the punitive sanctions and the social and economic consequences which follow self-exposure under a grant of immunity. The nub of his position is that the constitutional privilege against self-incrimination cannot be met by a statutory substitute no matter how broad the immunity. If Brown v. Walker is to be reconsidered and overruled, obviously that is to be done by the Supreme Court and not the District Court. In passing it may be noted that as recently as Smith v. United States similar

[2] 18 U. S. C. § 3486(c).

[3] 161 U. S. 591.

objections were advanced before the Supreme Court and rejected.[4] Moreover, immunity statutes have been before the Supreme Court in seven cases subsequent to Brown v. Walker.[5] Its authority remains unimpaired and its principle is firmly imbedded in our constitutional law.

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[4] 337 U. S. 137, 147 (1949).

[5] In Jack v. Kansas, 199 U. S. 372 (1905) the Court held that possible incrimination under federal law was no objection to a state immunity statute.

In Heike v. United States, 227 U. S. 131 (1913) the Court held that the immunity did not extend to matters concerning which the witness could have been compelled to testify without an immunity statute, such as the production and identification of corporate records.

United States v. Monia, 317 U. S. 424 (1943) held that under the Act of 1893, a witness acquired immunity simply by virtue of his appearance and testimony in obedience to a subpoena, and that it was not necessary for him to claim his privilege against self-incrimination before answering questions.

Feldman v. United States, 322 U. S. 487 (1944) held that the Fifth Amendment does not forbid the use in a federal criminal case of self-incriminating testimony compelled by state authorities under a state immunity statute.

In Shapiro v. United States, 335 U. S. 1 (1948), the Court held that no privilege attached to records required to be kept under the emergency price control act, and that a witness did not acquire immunity by appearing in response to a subpoena and testifying as to such records, even though he claimed privilege before answering the questions.

In Smith v. United States, 337 U. S. 137 (1949), the Court held that a witness who appeared in response to a subpoena and, after having claimed his privilege, answered all questions asked of him, was immune from prosecution under an indictment involving transactions, matters and things concerning which he testified.

Adams v. Maryland, 347 U. S. 179 (1954) held that 18 U. S. C. 3486, before amendment by the instant act, barred the use in a state prosecution of testimony previously compelled before a congressional committee.

[fol. 40] Immunity statutes have a long history as a means of forcing out evidence necessary to law enforcement which absent such legislation cannot be compelled where a witness asserts his privilege against self-incrimination.[6] The constitutional elements necessary to the validity of an immunity statute are clear. While Congress has the power to enact legislation to compel a witness to answer incriminating questions upon a grant of immunity, the immunity tendered must provide a full and complete substitute for the privilege against self-incrimination.[7] The constitutional equivalent of the privilege must be absolute immunity from prosecution for any criminal offense arising out of the compelled testimony.[8] The witness urges that the present statute is invalid in failing to meet these tests. Thus a basic question is whether the protection afforded by the statute is co-extensive with the constitutional privilege.

[fol. 41] The witness' primary contention here is that the statute fails to give complete immunity because it leaves him subject to prosecution for state crime. He argues (1) that Congress is without the constitutional power to bar state prosecutions, and (2) assuming such power, the statute literally read only prohibits the use of testimony in a state prosecution but does not immunize the witness against prosecution in any state court so long as the testimony itself is not used.

The short answer to both contentions is Murdock v. United States.[9] There the Supreme Court held that the privilege against self-incrimination could not be invoked before a federal tribunal where the incrimination feared was under state law. If the privilege does not extend to possible crimination under state law and the immunity need only be as broad as the privilege, then it is not an objection to the statute that it does not protect the witness from possible state prosecution.[10] While the Murdock case, what-

[6] See Shapiro v. United States, 335 U. S. 1, 6, fn. 4.
[7] Counselman v. Hitchock, 142 U. S. 547.
[8] Brown v. Walker, 161 U. S. 591.
[9] 284 U. S. 141.
[10] Feldman v. United States, 322 U. S. 487; Jack v. Kansas, 199 U. S. 372.

ever objections may be raised to its rule,[11] is a sufficient answer to the witness' contention as long as its authority remains unimpaired, I am of the view that Congress has the constitutional power, certainly with respect to matters touching upon the national defense or security, to provide for a grant of immunity in exchange for compelled testimony which is broad enough to prohibit state prosecutions.

The power to provide for the common defense of the United States is, under the Constitution, expressly granted [fol. 42] to the Congress.[12] A "necessary and proper"[13] incident of that power is authority to enact legislation to secure evidence from those allegedly possessing knowledge of actions aimed at undermining the security of the government and to protect it against its enemies, domestic or foreign. By their very nature crimes of subversion, treason, espionage and the like, and conspiracies to commit such crimes, are aimed generally at the federal government, representing the totality of the forty-eight states. While such criminal pursuits may also have their impact upon individual states, Congress, since they are matters of paramount national concern, may in passing laws to deal with them occlude the field. Conceding the right of a state, absent federal action, to protect itself against seditious and like activity,[14] if Congress enacting legislation essential to the national defense or security, determines that immunity granted to a witness on the basis of his compelled testimony shall also extend to state prosecutions, it is within its power to do so. Such congressional legislation under the Constitution is then "the supreme law of the

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[11] United States v. Marcello, 5 Cir., 196 F. 2d 437; United States v. DeCarlo, 102 F. Supp. 597; see also Ballman v. Fagan, 200 U. S. 184; United States v. Saline Bank of Virginia, 1 Pet. 100.

[12] United States Constitution, Art. I, § 8, cl. 1.

[13] United States Constitution, Art. I, § 8, cl. 18.

[14] Gilbert v. Minnesota, 254 U. S. 325; Gitlow v. New York, 260 U. S. 703. These cases were decided prior to the enactment of the Smith Act, 18 U. S. C. § 2385.

land" and state interests must yield to the paramount national concern.[15]

The immunity provided under the act and the intended correlative bar to state prosecution go no further than necessary to effectuate the legitimate congressional purpose. It cannot be said that the means are not "appropriate" and [fol. 431] "plainly adapted to that end."[16] The act does not cover inquiries into all crime. Its stated purpose is to secure evidence of federal crimes affecting the national defense or security by means of an effective grant of immunity. It is specifically restricted to offenses involving treason, sabotage, espionage, sedition, and conspiracy to commit any of the foregoing; it also encompasses violations of the Internal Security Act, the Atomic Energy Act, and the Immigration and Nationality Act. Viewed against its objective, the statute is a necessary and proper incident of Congress' power to protect the national interest against the foregoing offenses and hence is "the supreme law of the land."

Recently in Adams v. Maryland the Supreme Court held that the predecessor section of the present act (former 18 U.S.C. § 3486) prohibited the use in state courts of testimony given before a congressional committee. The State of Maryland which had obtained a conviction against Adams by use of his testimony before a congressional committee, argued that Congress was without power to bar the use of such testimony in state courts. This contention was rejected. The Court also held that former § 3486 was a legitimate exercise of the congressional power "necessary and proper" to carry out its legislative function and was binding upon the states as "the supreme law of the land." While the Adams case only dealt with federal immunity as a bar to the use of testimony in the state courts as distinguished from a bar to state prosecutions, its rationale

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[15] United States Constitution, Art. VI, cl. 2; Brown v. Walker, 161 U. S. 591, 606; Hines v. Davidowitz, 312 U. S. 53.

[16] McCullough v. Maryland, 4 Wheat. 316, 421; Adams v. Maryland, 346 U. S. 179, 183.

would seem to apply to both situations.[17] And since the [fol. 44] Supreme Court has held that Congress has the power to pre-empt the field of alien registration[18] against a state law requiring alien registration and intended to meet seditious and like activities, it is hard to see why the prosecution of offenses undermining the national defense or security may not also be an exclusively federal concern.

The witness however contends, that assuming congressional power exists, the statute fails to grant immunity from state prosecutions. He argues that the phrase "in any court" refers only to the use of evidence but does not bar state prosecution. The language of the present immunity statute is as broad and plain as words can express, and indeed, is more comprehensive than the immunity statute upheld in Brown v. Walker as affording the witness protection coextensive with his privilege. Thus it provides that not only is the witness immune from prosecution with respect to any matter as to which he is forced to testify, but also that the testimony so compelled may not be "used as evidence in any criminal proceeding * * * against him in any court." While it is true that the phrase "in any court" does not appear in the clause barring prosecutions based upon compelled evidence, the language of the clause dealing with prosecutions is by itself broad enough to encompass state as well as federal prosecution.[19] The congressional purpose to extend immunity to state prosecutions [fol. 45] was expressly stated by the House Committee.[20]

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[17] The Attorney General asserted that Congress had the power to extend the immunity granted in exchange for testimony to include state court proceedings. Hearings before Committee on the Judiciary on H. R. 6899, 83rd Cong., 2nd Sess., June 8, 1954, p. 42; Report of Committee of Assn. of the Bar of the City of New York on Immunity Bills, July 7, 1954, pp. 10-11; Commonwealth v. Nelson, 377 Pa. 58, 104 A. 2d 133, cert. granted sub nom. Pennsylvania v. Nelson, 348 U. S. 814.

[18] Hines v. Davidowitz, 312 U. S. 53.

[19] Cf. Brown v. Walker, 161 U. S. 591, 608.

[20] "The language of the amendment that 'no such witness shall be prosecuted or subjected to any penalty or forfeiture

At the time the Congress passed the bill it was aware of the decision in Adams v. Maryland and intended to afford a witness the fullest protection by enlarging the scope of immunity to bar state prosecutions as well as the use of evidence in state courts concerning any matter as to which his testimony has been compelled.

The witness next urges that the act is unconstitutional in that it requires the court to perform a non-judicial function. Here he contends that the court is called upon to approve the application for the grant of immunity—in effect to exercise a veto power over the determination of the United States Attorney that the public interest requires that immunity be granted to the witness. Thus he urges that the ultimate determination of whether immunity should be granted to a witness who has asserted his privilege rests with the court, thereby requiring it to exercise a power that is exclusively either legislative or executive; that for the court to make such determination does violence to the separation of powers concept and intrudes the court into matters which call for policy rather than judicial decisions.

[fol. 46] In my view it is unnecessary to pass upon the issue of whether or not a power in the court to approve a grant of immunity offends constitutional limitations. Section (c), which we are considering, is clear and unambiguous on its face. It contains no language, either express or implied, which vests discretionary power in the court to

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for or on account of any transaction, matter, or thing concerning which he is so compelled to testify, after having claimed his privilege against self-incrimination, to testify or produce evidence', is sufficiently broad to ban a subsequent State prosecution if it be determined that the Congress has the constitutional power to do so. In addition, the amendment recommended provides the additional protection—as set forth in the Adams case, by outlawing the subsequent use of the compelled testimony in any criminal proceeding—State or Federal.

"By the use of these two distinct concepts, the committee believes that the fullest protection that can be afforded the witness will be achieved." Committee on the Judiciary, H.R. Rep. No. 2606, 83rd Cong., 2nd Sess. (August 3, 1954), p. 7.

uphold or overrule the judgment of the United States Attorney, as approved by the Attorney General, that the testimony of a witness is necessary to the public interest and warrants the grant of immunity to secure it. Indeed a reference to sections (a) and (b) of the act dealing with the method whereby immunity may be granted to witnesses appearing before the Congress or its committees negates the contention advanced by the witness. These sections relating to congressional investigations provide that the testimony of a witness may be compelled upon the assertion of his constitutional privilege when (1) in proceedings before one of the houses of Congress a majority of the members present of that house, or (2) in proceedings before a committee, two-thirds of the full committee have voted for the grant of immunity; (3) and an order of the United States District Court wherein the inquiry is being carried on has been entered requiring the witness to testify or produce evidence.

Significantly, it is further provided "such an order *may* be issued by the United States District Judge" and that neither House nor any of their Committees shall grant immunity to any witness "without first having notified the Attorney General of the United States of such action and having secured the *approval* of the United States District Court in the district wherein such inquiries are being held" (emphasis supplied). The language in these sections of the act purports to vest discretion in the court and specifically requires its approval of any grant of immunity. The subsequent section (c) pertaining to proceedings before a [fol. 47] grand jury or cases before a District Court contains no such reference to the court's function or restriction upon the grant of immunity. The only reference to the court is markedly different from that contained in the sections dealing with congressional investigations. In the instance of grand jury or court proceedings involving national defense or security it must appear (1) that in the judgment of the United States Attorney the testimony of a witness regarding such matters is necessary to the public interest; (2) that the Attorney General has approved the application by the United States Attorney.

The section then provides that upon application "to the

court that the witness shall be instructed to testify or produce evidence subject to the provisions of that section, and upon order of the court such witness shall not be excused from testifying or producing books, papers or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture." Thus the only approval required under section (c) is that of the Attorney General in support of the application of the United States Attorney.

Certainly it is logical to assume that had the Congress intended, with respect to grand jury and court proceedings, to vest the same discretion and power of approval in the court as in the instance of congressional investigations it would have used the very language employed in the section dealing with congressional committees.

Absent a statute granting absolute immunity to a witness who has validly asserted his privilege against self-incrimination the courts are without power to compel him to answer. When an order is sought to force a witness to testify in exchange for immunity against prosecution authorized by statute, he is entitled to advance before the court any other [fol. 48] ground, legal or constitutional, for continued refusal to answer. And only when it appears that full and absolute immunity has been substituted for his constitutional right against self-incrimination, and no other legal barrier exists, may he be compelled to answer.[21]

In the present statute the court is empowered to order the witness to answer whenever it appears that the conditions of the grant of immunity, as specified in the statute and as outlined above, exist. Thus the court must be satisfied that (1) the grand jury or court proceeding relates to investigations in cases involving matters enumerated in section (c); (2) the United States Attorney certifies with respect to such matters it is necessary in the public interest that the testimony of the witness who has claimed his privilege be obtained in exchange for a grant of immunity; (3) the Attorney General approves the application; (4) no other legal objection exists to the compulsion of the witness' testimony. Thus the order of the court gives assurance

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[21] Smith v. United States, 337 U. S. 137, 150.

(a) that all conditions have been complied with before the immunity is granted to the witness—that the immunity power is not frittered away in cases not within the framework of the congressional intent; and (b) that the witness is protected against subsequent prosecution or the use of evidence with respect to matters as to which his testimony has been compelled by a determination that an effective grant of immunity has been made. The immunity takes effect when the court finds that all the prerequisite conditions have been met and the witness has answered the questions as to which he previously asserted the privilege.

I conclude that the statute, by the phrase "upon order of the court" in section (c) refers to the court's function in determining that the application complies with the require-[fol. 49] ments specified in that section before the witness may be ordered to answer. And this is clearly a judicial function.[22]

But even if ambiguity could be wrung from the statutory language, the witness' contention that the legislative history shows a clear and inescapable congressional purpose to require court approval of each grant of immunity is without force. While the contention may be true of immunity grants by Congress, about which attention was primarily centered, the history shows no such intent as to the section dealing with witnesses before courts and grand juries.

The witness places great reliance on a portion of the report of the House Committee on the Judiciary[23] which states: "In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill."[24] The witness insists that the

[22] See Interstate Commerce Commission v. Brimson, 154 U. S. 447.

[23] This committee substituted its own version for both the bill as it passed the Senate and various bills introduced in the House. Committee on the Judiciary, H.R. Rep. No. 2606, 83rd Cong., 2d Sess., August 3, 1954, p. 3.

[24] Id. at 8.

only possible "independent" parties in cases before courts and grand juries are the Attorney General and the court. But this view ignores the significance of the phrase "interested parties"—an utterly inappropriate description of a court determining a controversy between contending parties. Since the United States Attorney and the Attorney General are to form their judgments separately,[25] the phrase "independent but interested parties" would seem to fit them better than the court.

[fol. 50] Moreover, the context of the paragraph refutes the witness' interpretation. After explaining that the procedure necessary to grant immunity before a congressional committee avoids the danger of "immunity baths," the report states that similar precautions exist in cases before courts and grand juries. The explanation continues that if the United States Attorney decides in an authorized matter the public interest requires that immunity be granted to a witness who has asserted his privilege, the prosecutor "must first obtain the approval of the Attorney General for such grant and then apply to the court for the *necessary instruction* to the witness to testify or produce evidence. All conditions must be complied with before the grant of immunity can be given to the witness" (emphasis supplied). This language hardly supports the view that the court is to exercise a discretionary function or a veto power as to whether the testimony of the witness is required in the public interest. The "necessary instruction" to the witness appears to refer to the usual direction or instruction issued by a court whenever a witness refuses, without legal justification, to answer questions before a grand jury or court. This instruction or order issued only after the witness has been afforded an opportunity to advance his objections, forms the basis of subsequent proceedings for failure to comply. Moreover, the two references in the Committee's report to section (c)[26] specifically mention approval by the Attorney General and omit any mention whatsoever of court approval or discretion. Thus the Committee's summary of section (c) parallels the statutory language. Fi-

[25] Id. at 9.

[26] Id. at 8, 9.

narily, it is not without significance that the Committee's explanation concludes with the statement "All conditions must be complied with before the grant of immunity can be given to the witness."

[fol. 51] The witness also relies on statements made during the House debates by Representative Keating, a member of the Judiciary Committee, and one of the bills' leading proponents on the House floor, which tend to support his construction.[27] Whatever force these remarks may have,[28] is, however, undermined by the statement of another member of the House Judiciary Committee, Representative Walter, who took a quite different view.[29] In view of the fact that the bill's leading proponents differed as to the role assigned to the courts, and that the Committee report supports the government's view at least as strongly as the witness', the scanty legislative history is far from conclusive. It contains fully as much ambiguity as the witness professes to find in the statute.

But the witness insists that the rejection by the House Committee of Representative Keating's bill which made no provision for court review of immunity grants requires acceptance of his interpretation. This argument fails to take into account the numerous substantial alterations which lead the Committee to draft its own bill as a sub-

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[27] The bill passed the Senate without debate on the motion of Senator McCarran who paraphrased the report of the House Committee on the Judiciary. While saying that the sections dealing with proceedings before Congressional committees and those before courts and grand juries contained "similar provisions" he made no attempt to define the court's role in the latter group. 100 Cong. Rec. 13310 (Aug. 11, 1954).

[28] Whether or not statements made during general debate by individual members of the reporting committee are sufficient to show a congressional intent may be open to question. See Jackson, J., concurring in Schwegmann Brothers v. Calvert Distilleries Corp., 341 U. S. 384, 395; Note, a Re-evaluation of the Use of Legislative History in the Federal Courts, 52 Col. L. Rev. 125.

[29] 100 Cong. Rec. 12604 (August 4, 1954).

stitute not only for Mr. Keating's proposal but also for [fol. 52] a bill which had passed the Senate.[30] One fundamental change was the insertion of judicial review of legislative grants of immunity in connection with legislative investigations. This provision was apparently inserted to resolve the dispute over whether Congress or the Attorney General should have the ultimate responsibility in granting immunity to witnesses before congressional committees—a problem entirely absent where the witness testifies before a court or grand jury. An entirely new and basic provision in the Committee bill was the restriction of the statute's scope to matters involving national security. In this connection the Committee bill provided a judicial check to insure that immunity was not granted in situations outside the statute's narrowed compass.[31] In view of the several possible explanations for the substitution of the Committee bill for Representative Keating's proposal, and others, the mere fact of substitution adds nothing to the clear words of the statute.

The most that can be said for the legislative history is that it is on the whole inconclusive. Certainly, it contains nothing that requires the court to reject the construction which the statutory language clearly requires. Especially is this so where the construction contended for purports to raise a serious constitutional question as to the rôle of the judiciary under the doctrine of separation of powers. The Supreme Court has repeatedly warned "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [fol. 53] question may be avoided."[32] Indeed, the Court has stated that words may be strained "in the candid serv-

[30] Committee on the Judiciary, H.R. Rep. No. 2606, 83rd Cong., 2nd Sess., August 3, 1954, pp. 3-4.

[31] This seems to have been the purport of Mr. Walter's remarks. 100 Cong. Rec. 12604 (August 4, 1954).

[32] Crowell v. Benson, 285 U. S. 22, 62; United States v. Rumely, 345 U. S. 41, 45; United States v. CIO, 335 U. S. 106, Brandeis, J., concurring in Ashwander v. TVA, 297 U. S. 288, 341, 348, and cases cited

ice of avoiding a serious constitutional doubt."[33] Here there is no need to strain words. It requires neither torturing of language nor disregard of a clear legislative policy[34] to avoid the constitutional question advanced by the witness. Indeed, to reach the constitutional issue would require straining of language. In such circumstances the court's duty is plainly to avoid the constitutional question.

Since the statute does not vest power in the court to review the determination of the United States Attorney as concurred in by the Attorney General, the witness' further argument that the court should, upon the facts, overrule the judgment of the United States Attorney that it is in the public interest that immunity be granted necessarily falls.

Finally, the defendant contends that regardless of the validity of the statute, some of the questions as to which the application is made are immaterial to the matter under investigation and further, that they infringe his rights under the First Amendment to the Constitution of the United States. As to the first objection, since the questions appear to come within the framework of an inquiry into national defense or security, the witness "is not entitled to urge objections of incompetency and immateriality, such as a party might raise, for this is no concern of his."[35] [fol. 54] The witness' second objection, that questions relating to membership in the Communist Party of himself and others violate his rights under the First Amendment is equally untenable. Any question on this score is concluded by Josephson v. United States, where the power of Congress to inquire into membership in the Communist

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[33] United States v. Rumely, 345 U. S. 41, 47.

[34] Cf. Shapiro v. United States, 335 U. S. 1, 31.

[35] Blair v. United States, 250 U. S. 273, 282; Nelson v. United States, 201 U.S. 91, 115; United States v. McGovern, 2 Cir. 60 F. 2d 880, 888-889; Application of Radio Corp. of America, SDNY, 13 FRD 167, 170. But cf. Green v. United States, 2 Cir., 193 F. 2d 111, 113.

Moreover, the questions to which the witness objects appear to be material to the subject matter under inquiry. United States v. Flynn, 2 Cir., 216 F. 2d 354, 360.

Party was upheld against a similar objection.[38] If Congress possesses such power it would appear that a grand jury engaged in an inquiry to determine whether a crime has been committed possesses no less power to inquire into the same subject matter.

Accordingly, the application to instruct the witness to answer the questions propounded to him before the grand jury and to testify and produce evidence with respect to matters under inquiry before said grand jury is granted.

Since the application contains the detailed questions before the grant jury, in order to preserve the secrecy of the grand jury proceedings the file papers shall be sealed subject to further order of the Court.

Settle order on notice.

January 31, 1955.

(S.) Edward Weinfeld, United States District Judge.

[fol. 55] In United States District Court

Order Requiring William Ludwig Ullmann to Appear and Testify Before Grand Jury—February 8, 1955

J. Edward Lumbard, United States Attorney for the Southern District of New York; having on the 10th day of November, 1954, made an application, orally and in writing, upon notice, to William Ludwig Ullmann, a witness, appearing before a Grand Jury of the Southern District of New York then inquiring into matters involving espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere, for an order instructing said William Ludwig Ullmann to testify and produce evidence before said Grand Jury pursuant to the provisions of Title 18, United States Code, Section 3486, as amended; and said application having duly come on to be heard before this Court on the 10th day of November, 1954.

Now, on reading the written application of J. Edward

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[38] Josephson v. United States, 2 Cir., 165 F. 2d 82. Accord: Barsky v. United States, D. C. Cir., 167 F. 2d 241; Lawson v. United States, D. C. Cir., 176 F. 2d 49.

Lumbard, Esq., the United States Attorney in and for the Southern District of New York, the approval of the Attorney General of the United States, dated November 5, 1954, to said application, the affidavit of J. Edward Lumbard, duly sworn to the 18th day of November, 1954, and the affidavits of E. Hyatt Mossburg; Maurice A. Taylor and Edward L. Grampp, duly sworn to the 1st day of December, 1954, all submitted in support of said application; the affidavit of William Ludwig Ullmann, duly sworn to the 17th day of November, 1954 in opposition to said application; and after hearing J. Edward Lumbard, Esq., United [fol. 56] States attorney for the Southern District of New York; (L. E. Broome and B. Franklin Taylor, Esqs., Special Assistants to the Attorney General, of counsel) in support of said application, and Nathan Witt, Esq., and Leonard B. Boudin, Esq., attorneys for William Ludwig Ullmann, the witness, in opposition thereto; and due deliberation having been had thereon; and the Court having filed its opinion on February 1, 1955; and it appearing as follows:

(1) William Ludwig Ullmann was subpoenaed to appear and did appear on the 3rd day of November, 1954, before a Grand Jury of the Southern District of New York;

(2) The Grand Jury was then and there inquiring into matters involving espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere;

(3) William Ludwig Ullmann refused to answer certain questions relating to matters under inquiry before said Grand Jury and specifically set forth in the aforesaid application on the ground that his answers might tend to incriminate him;

(4) In the judgment of the United States Attorney the testimony of the said witness concerning the aforesaid matters is necessary to the public interest of the United States; and

(5) Said application for an order that the witness shall be instructed to testify or produce evidence subject to the provisions of Title 18, United States Code Section 3486, as amended, was made with the approval of the Attorney General of the United States;

it is

[fol. 57] Ordered, that William Ludwig Ullmann appear as a witness before said Grand Jury at Room 1401 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on February 15, 1955 at 10:30 o'clock in the forenoon; and it is further

Ordered, subject to the provisions of Title 18, United States Code, Sections 3486, as amended, that William Ludwig Ullmann be and he hereby is instructed to answer the questions propounded to him before the Grand Jury and to testify and produce evidence with respect to such matters under inquiry before said Grand Jury; and it is further

Ordered, that the papers filed herein shall be sealed subject to the further order of the United States District Court for the Southern District of New York or any Judge thereof.

Dated New York, N. Y., February 8, 1955.

Edward Weinfeld, United States District Judge.

[fol. 58] In United States District Court, Southern District of New York

M. 11-188

In the Matter of William Ludwig Ullmann, a Witness Before the November, 1954, Grand Jury

Before Hon. Thomas F. Murphy, District Judge

Hearing of March 8, 1955

Appearances:

J. Edward Lumbard, Esq., United States Attorney, Attorney for the United States of America; By B. Franklin Taylor, Esq., Special Assistant to the Attorney General.

Victor Rabinowitz, Esq., Attorney for the Witness.

The Court: Where is the witness?

Mr. Rabinowitz: He is right here, sir (indicating).

Mr. Taylor: Your Honor, this morning the defendant, Mr. Ullmann, appeared before the Grand Jury. The ladies and gentlemen constituting that Grand Jury are sitting on my left. He appeared in response to an order issued by District Judge Weinfeld. That order was issued following an application by the United States Attorney, which [fol. 59] application was made pursuant to the new Immunity Statute, Title 18, section 3486, as amended.

Perhaps I better read the entire order.

(Reading) United States District Court, Southern District of New York.

In re: William Ludwig Ullmann.

Order.

J. Edward Lumbard, United States Attorney, for the Southern District of New York, having on the tenth day of November, 1954, made an application orally and in writing, upon notice to William Ludwig Ullmann, a witness appearing before the Grand Jury of the Southern District of New York, then inquiring into matters involving espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere, for an order instructing the said William Ludwig Ullmann to testify and produce evidence before said Grand Jury pursuant to the provisions of Title 18, United States Code, section 3486, as amended, and said application having duly come on to be heard before this Court on the tenth day of November, 1954.

Now, on reading the written application of J. Edward Lumbard, Esq., United States Attorney in and for the Southern District of New York, the approval of the Attorney General of the United States, dated November 5, 1954 to said application; the affidavit of J. Edward Lumbard, duly sworn to the 18th day of November, 1954; and the affidavits of E. Hyatt Mossburg, Maurice A. Taylor and Edward L. Grampp, duly sworn to the 1st day of November, 1954, all submitted in support of said application; the affidavit of William Ludwig Ullmann, duly sworn to the 17th day of November, 1954, in opposition to said application; after hearing J. Edward Lumbard, Esq., [fol. 60] United States Attorney for the Southern District

of New York, L. E. Broome and B. Franklin Taylor, Special Assistants to the Attorney General of Counsel, in support of said application; and Nathan Witt, Esq., and Leonard B. Bondin, Esq., attorneys for William Ludwig Ullmann, the witness, in opposition thereto; and due deliberation having been had thereon, and the Court having filed its opinion on February 1, 1955, and it appearing as follows:

1. William Ludwig Ullmann was subpoenaed to appear and did appear on the 3d day of November, 1954 before a Grand Jury of the Southern District of New York.

2. The Grand Jury was then and there inquiring into matters involving espionage and conspiracy to commit espionage in time of war or in the Southern District of New York and elsewhere;

3. William Ludwig Ullmann refused to answer certain questions relating to matters under inquiry of the aforesaid Grand Jury and specifically set forth in the aforesaid application on the ground that his answers might tend to incriminate him;

4. In the judgment of the United States Attorney, the testimony of the aforesaid witness on the aforesaid matters is necessary to the public interests of the United States; and

5. Said application for an order that the witness shall be instructed to testify or produce evidence subject to the provisions of Title 18, United States Code, section 3486 as amended, was made with the approval of the Attorney General of the United States;

It is ordered that William Ludwig Ullmann appear as a witness before said Grand Jury at Room 1401 in the [fol. 61] United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on February 15, 1955, at 10:30 o'clock in the forenoon;

And it is further ordered, subject to the provisions of Title 18, United States Code, section 3486 as amended, that William Ludwig Ullmann be and he hereby is instructed to answer the questions propounded to him before the Grand Jury and to testify and produce evidence with respect to such matters under inquiry before said Grand Jury.

And it is further ordered that the papers filed herein shall be sealed subject to the further order of the United States District Court for the Southern District of New York or any Judge thereof.

Dated: New York, N. Y., February 8, 1955. Edward Weinfeld, United States District Judge.

This order was appealed from and the appeal was dismissed by the Court of Appeals a week ago last Thursday on the ground that it was not an appeal from a final decision.

Consequently, the bringing of Mr. Ullmann before the Grand Jury was delayed until this time. He did appear this morning. He was asked the questions which he had refused to answer on November 3, 1954. He was also asked a few additional questions. He again, despite the knowledge of this order, refused to answer those questions or to give testimony as to those matters as to which he had previously invoked his privilege.

Counsel for Mr. Ullmann had informed us in advance of Mr. Ullmann's intention to refuse to obey the order. His concern is that the statute has not been construed by the Appellate Courts and there has been no determination of its constitutionality.

[fol. 62] Counsel for Mr. Ullmann agreed to waive the necessity for a notice as provided by Rule 42(b) of the Rules of Criminal Procedure. And I believe he will stipulate to that effect.

Mr. Rabinowitz: Yes. I waive any notice that may be required by either the Rules or any other provision of law, so that this matter may be quickly heard.

Mr. Taylor: We are prepared to put the stenographer who took the minutes this morning on the stand and to introduce into evidence what transpired before the Grand Jury today, as to the fact of the asking of the questions and the refusal to answer, and to institute contempt proceedings at this time, if it meets with your Honor's approval.

Mr. Rabinowitz: If it is satisfactory, I would be perfectly willing to waive the reading of the minutes as well, your Honor.

The Court: Would you stipulate that you refuse to an-

swer the same questions that Judge Weinfeld ordered him to answer?

Mr. Rabinowitz: Yes, sir, and that the reason given for his refusal was that he feared the answers might incriminate him and he pleaded his privilege under the Fifth Amendment of the Constitution.

The Court: There would not be any need to read them, I guess.

Are you willing now to proceed with the contempt proceedings as if all notices were given?

Mr. Rabinowitz: Yes. As perhaps was implied in Mr. Taylor's presentation, our primary concern here is to secure an appeal—to secure a decision on this matter from the Appellate Courts as rapidly as possible. We have no [fol. 63] desire to delay the matter or to rely on any technical matters here.

We did attempt to appeal before, but the Court held, apparently, that a contempt finding is necessary before an appeal will be heard. Therefore, we have agreed to expedite this matter so that we may make the necessary record for the Court of Appeals. I am prepared to proceed on that basis.

I do not know whether it would be appropriate for me to re-argue the matter before Judge Weinfeld. The matter, of course, was briefed and argued fully before Judge Weinfeld, and he has submitted an order. The grounds of the opposition which we urge are summarized by Judge Weinfeld.

The Court: I read the opinion.

Mr. Rabinowitz: I assume it won't be necessary for me to re-argue the matter, but merely to state for the record that we reassert all of the grounds we urged before Judge Weinfeld in opposition to the statute, in support of our contention that the statute was unconstitutional. We will rest on that and proceed on that basis in the Appellate Courts.

The Court: The only thing left for me then is to make a finding of contempt.

Mr. Taylor: Yes. It is our position that Mr. Ullmann appeared pursuant to a valid order of the District Court this morning and refused to obey that order.

The Court: I hold the witness, Mr. Ullmann, in contempt and sentence him to six months.

Mr. Rabinowitz: Now, your Honor, may I request, first, that your order provide that he be given an opportunity to purge himself. The Government, as I undersand it, is [fol. 64] primarily interested in getting his testimony and not in imprisoning him, and further, in order to make an appeal possible under the circumstances, we would request that provision.

The Court: Yes.

Mr. Rabinowitz: May I further request that your Honor stay the application of execution of this order pending our appeal to the Court of Appeals?

The Court: No, I do not think so. Let the Court of Appeals do that, if they wish, but my order is that he be put into the custody of the United States Marshal.

Mr. Rabinowitz: Now, may I request that your Honor postpone execution of this order for just a few days, so that I can make an application to the Court of Appeals for a stay?

The Court: You can make an application today.

Mr. Rabinowitz: I can, if the order is entered immediately. I have to file a notice of appeal and there is a mechanical problem of typing the papers, and so forth.

I have already spoken to the Clerk of the Court of Appeals. I anticipate, of course, that this would arise. He advises me that I can make application for a stay to be heard by a Judge, I suppose, this afternoon. I do not know whether he would have authority to grant a stay or not.

The Court: I would think so. You can make an application to one Circuit Court Judge.

Mr. Rabinowitz: Yes, but I would have to draw papers for that. As I say, the order has not even been entered so that I cannot even take an appeal at the moment. I would be perfectly willing to make my application tomor- [fol. 65] row, if your Honor would just stay execution until tomorrow. There is really no necessity to incarcerate the defendant. This is an effort to proceed, to get an adjudication in good faith on it.

The Court: Yes, but for factual purposes, my order is final. It is not only for the sake of making a test case——

Mr. Rabinowitz: I recognize that, sir. It is just that there are purely mechanical matters, and as I say, I cannot even file a notice of appeal until an order has been signed. Then I would have to draw motion papers and supporting affidavit.

The Court: No; you could apply to the individual Judge, orally, as I understand the Rule.

Mr. Rabinowitz: Even before a notice of appeal?

The Court: No, the notice of appeal is filed, but you can do that while the man is sitting inside. It is done every day in connection with convictions after trial.

Mr. Rabinowitz: Has the United States Attorney an order ready for signature?

The Court: As to a commitment, it will not take Mr. Sweeney too long to do it. How long will it take?

The Clerk: If they want us to draw it, a few minutes. They might want to draw a judgment of their own. If they want us to draw it, about five minutes.

Mr. Rabinowitz: Do you want an order?

Mr. Taylor: It is suggested by Mr. Bailey, Assistant United States Attorney, that the Government might ask that the surrender time be 4 P.M., which would allow preparation of the order and would allow Mr. Rabinowitz an opportunity——

[fol. 66] The Court: I know that is the practice for sentencing. I do not think I have the power, once I hold him in contempt or sentence a man to the custody of the Attorney General. I think I am finished as far as my jurisdiction is concerned. I know the Marshal does not go over to West Street until 4 o'clock, so he won't be too uncomfortable by 4.

Mr. Rabinowitz: That assumes, of course, that I can get a Circuit Court Judge by 4 P.M.

The Court: I know, but what we are all trying to do here is to make things very comfortable for everybody, when the man is in contempt. It might well be that Judge Weinfeld's order will be sustained.

Mr. Rabinowitz: I think that it may very well be, and it might very well be that it won't. In view of the fact that the purpose here is primarily to secure an adjudication, and sooner or later this statute will have to be tested, I just am trying to avoid any unnecessary inconvenience

to the client who, in a sense, is acting here as a test case, as a guinea pig, shall we say, for us.

I can proceed with as much speed as is physically possible. But I still will have to draw a notice of appeal, a notice of motion and affidavits. I might say that it has been done in draft form.

The Court: A notice of appeal is at least one side of one——

Mr. Rabinowitz: It is purely a mechanical problem and the matter of getting a Judge by 4 o'clock, that is the other mechanical problem.

The Court: I cannot help you. I do not think I have the power to forestall the surrender. If a Circuit Judge wants to let him out on bail or stay it, that is well and [fol. 67] good, but he will not leave this building until 4 o'clock at the earliest, is that right?

The Marshal: That is right.

The Court: So that is the judgment of this Court.

Mr. Taylor: The Government will undertake to prepare an order and commitment and present it to your Honor this afternoon as early as we can.

And, as I understand your Honor's sentence, it is six months or until he purges himself.

All right.

The Court: Do you need the Grand Jury back today? Should they go back or are they excused now?

Mr. Taylor: The Grand Jury is subject to recall.

[fol. 68] In United States District Court

No. C'146'338

United States of America

v.

William Ludwig Ullmann, Witness Before the 11, 3 54 Grand Jury

Order Appealed From, Dated March 8, 1954

On the 8th day of March, 1955, came the attorney for the government and the defendant appeared in person and by counsel. Defendant waived the notice provided by Rule

42(b) Fed. Rules Crim. Proc. and stipulated in open court that he had appeared before the Grand Jury on the 8th day of March, 1955, and had refused to obey the order of this Court dated 2-8-55, which order was issued pursuant to the opinion of U. S. D. J. Edward Weinfeld, dated Jan. 31, 1955 In Re William Ludwig Ullmann.

It is Adjudged that the defendant has been convicted for contempt of Court for refusal to obey the aforesaid order of this Court. And the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized [fol. 69] representative for imprisonment for a period of Six Months or unless he sooner purges himself of contempt.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(S) Thos. F. Murphy, United States District Judge.

NOTICE OF APPEAL—March 8, 1955

IN UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

v.

WILLIAM LUDWIG ULLMANN, Defendant

SIR:

Please take notice that the Defendant, William Ludwig Ullmann, hereby appeals to the United States Court of Appeals for the Second Circuit, from the order of Honorable Thomas F. Murphy, United States District Judge, made on the 8th day of March, 1955, and entered in the

office of the Clerk of the United States District Court for [fol. 70] the Southern District of New York on the 8th day of March, 1955.

Dated: New York, N. Y., March 8, 1955.

Yours, etc., Nathan Witt, 9 East 40th Street, New York 16, N. Y., Leonard B. Boudin, 25 Broad Street, New York 4, N. Y., Attorneys for Defendant.

To: J. Edward Lumbard, Esq., United States Attorney for the Southern District of New York, Attorney for U. S. A., United States Courthouse, Foley Square, New York 7, N. Y.

[fol. 71] In United States Court of Appeals for the Second Circuit

No. 260

October Term, 1954

Argued March 16, 1955

Docket No. 23555

United States of America, Appellee

v.

William Ludwig Ullmann, Appellant

Before Clark, Chief Judge, Frank, Circuit Judge, and Galston, District Judge.

Appeal from a judgment for the United States District Court for the Southern District of New York, Entered by Judge Weinfeld. Affirmed.

Opinion Decided April 4, 1955

Frank, Circuit Judge:

The facts are fully stated in Judge Weinfeld's excellent opinion, F. Supp. , the reasoning and conclusions of which we adopt.

It is well to add a few words about defendant's contention concerning the doctrine of Brown v. Walker, 161 U. S. 591, which held that the Fifth Amendment privilege against self-incrimination relates solely to testimony which might lead [fols. 72-75] to defendant's prosecution for a crime. Defendant asks us to modify this doctrine in the light of new circumstances which have since arisen.[1] We are not pre-

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[1] Defendant's brief states the following:

"The Internal Security Act (64 Stat. 987 (1950)), 50 U. S. C. Secs. 740 et seq., federal executive orders and current loyalty procedures prohibit the employment of so-called subversives in government or defense facilities and make it unlawful for them to apply for or use passports. If the President declares the existence of 'an internal security emergency,' the Attorney General can intern anyone as to whom 'there is reasonable ground to believe that such person will probably engage in, or probably will conspire with others to engage in acts of espionage or sabotage.' 50 U. S. C. 812, 813).

"Employment as a longshoreman or in the privately owned merchant marine is subject to governmental screening (64 Stat. 428, 1950; 50 U. S. C., Sec. 191). Since June 1954, the Defense Department has promulgated an elaborate series of security regulations providing for the undesirable discharge of persons inducted into the Armed Forces under the Selective Service Acts for associations antedating their induction, with the consequent disgrace and economic injury. (See, for example, Department of the Army, Special Regulations S. R. 600-220.1.) It may reasonably be estimated that at least 15 million people are affected by security regulations imposed by the federal government.

"It is inconceivable that the government would license political dissenters to operate radio stations, would give them government contracts, or permit their employment in government jobs, defense plants, or other industries whose employment is controlled or regulated by it. The recently enacted statute which purports to deprive of citizenship persons convicted of Smith Act violations (Public Law, 83rd

[FOOTNOTE CONTINUED ON PAGE 57]

[FOOTNOTE CONTINUED FROM PAGE 56]

Cong., 2d Sess. (1954)) may be the precursor of extensive disabilities for persons compelled to make such admissions before congressional committees and grand juries.

"Obviously the immunity statute cannot relieve of these disabilities those who testify pursuant to its provisions. Certainly the Act was not intended to permit those who admit Communist Party membership before a grand jury thereby to become eligible for passports, for employment in the government or in defense facilities, for broadcasting station licenses, for retention in the armed forces and the right to remain outside concentration camps. All of the disabilities created by statute will exist just as effectively whether or not the immunity offered by the statute is, in fact, effective. Therefore, true immunity is not intended nor can it be given by the law. It could be argued, of course, that some of these disabilities might exist upon the basis of secret government information or might arise from the witness' assertion of his constitutional privilege. Without conceding the legality of the disabilities in either case, their existence does not mitigate the forfeiture arising from the compulsory disclosure or show that true immunity is given.

"In addition, there are innumerable state laws and municipal ordinances requiring registration. There are teacher's oath laws for loyalty and security purposes and there are political conditions of employment in state educational institutions and other state agencies. (See e.g., N. Y. Unconsolidated Laws, Chapter 14).

"The total punitive impact of these local regulations upon the witness compelled by federal authority to testify is truly terrifying. If the witness, admitting political guilt, is subjected to these local laws, he is receiving a meaningless 'immunity.' He has in fact surrendered his right to local employment and his freedom from local harassment by regulation or investigating committee, precisely because of such revelations. This dilemma points up the mockery of the 'immunity' concept in relation to 'subversive activities' today.

"In addition to the formal governmental sanctions, those exercised by the community and by private groups are so

[FOOTNOTE CONTINUED ON PAGE 58]

[FOOTNOTE CONTINUED FROM PAGE 57].

tremendous as to challenge an attempt at brief discussion. They include expulsion from labor unions, loss of private employment, discrimination in housing and schooling and public opprobrium.

"These sanctions are not generally regarded in the United States as reason for invoking the constitutional privilege. However, it is significant that in an analogous period of religious oppression, the 18th century, the English equity courts allowed witnesses to be silent where admissions of papacy would result in property loss (Harrison v. Southcote and Morehead, 2 Ves. sen. 389, 28 Eng. Rep. 249, 252 (Ch. 1751), or where ecclesiastical censure would follow (Finch v. Finch, 2 Ves. sen. 49, 28 Eng. Rep. 315 (Ch. 1752), or where a parliamentary seat was at stake. (Honeywood v. Selwin, 3 Atk. 276, 26 Eng. Rep. 961 (Ch. 1744)).

"Where the effect of political heresy is as serious as it is today, the dissenter is subject to penalties and forfeitures which, if anything, are more drastic than even criminal prosecution. This is not the place for a complete review of the employment opportunities of a political dissenter in the present political atmosphere. It is sufficient to say that government employment, federal, state or local, is effectively closed to such a person; that employment in a defense plant, in the entertainment industry, in a private educational institution, on a newspaper, in the advertising industry, in the merchant marine, as a longshoreman, and many similar occupations, is effectively closed. Only the most menial and low paying occupations are now available to many persons who have been branded as subversive by congressional committees, administrative agencies, or the daily press. Indeed, it might well be said that to many such persons the threat of criminal prosecution is the least of the concerns which face a man who is unable to pursue the occupation for which he has been trained.

"The beneficent purpose of the constitutional privilege cannot be achieved unless it is interpreted and applied in the light of the dangers today confronting the witness in a political case. Viewed in context, the statute does not give the witness the immunity to which he is constitutionally entitled."

pared to say that this suggestion lacks all merit.[2] But our possible views on the subject have no significance. For an inferior court like ours may not modify a Supreme Court doctrine in the absence of any indication of new doctrinal trends in that Court's opinions,[3] and we perceive none that are pertinent here. Accordingly, the argument must be addressed not to our ears but to eighteen others in Washington, D. C.

Affirmed.

[fol. 76] CLARK, Chief Judge (Concurring):

I concur, but regretfully. For the steady and now precipitate erosion of the Fifth Amendment seems to me to have gone far beyond anything within the conception of those justices of the Supreme Court who by the narrowest of margins first gave support to the trend in the 1890s. And serious commentators have found this new statute peculiarly disturbing in policy and in law. Griswold, The Fifth Amendment Today 80-84 (1955); Taylor, Grand Inquest 217-221, 296-300 (1955); Barth, Government by Investigation 130-134 (1955). It undermines and so far forth nullifies one of the basic differences between our justice and that of systems we contemn, namely the principle that the individual shall not be forced to condemn himself. Practically, as we know, no formal immunity can protect a minority deviator from society's dooms when he departs from its norms.

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[2] Cf. Taylor, Grand Inquest (1955) 217-221, 296-300; Griswold: The Fifth Amendment Today (1955) 80-81

[3] See Perkins v. Endicott Johnson Corp., 128 F. (2d) 208, 217-218 (C.A. 2):

"Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow, not to resist it." See also Picard v. United Aircraft Corp., 128 F. (2d) 632, 636 (C.A. 2); Judge Parker's opinion in Barnette v. West Virginia Board of Education, 47 F. Supp. 251, 252-253.

And realistically viewed there is much in the defendant's contention that at the end of the road is a charge of perjury supported by the oath of a renegade or paid informer. Convictions so obtained and punishment thus decreed cannot satisfy either the needs or the ideology of a democratic country committed to respect and toleration for dissident minorities. But I can see no escape from the Supreme Court decisions so carefully analyzed by Judge Weinfeld which, while they stand, are binding on us.

[fol. 77] Galston, District Judge (Concurring):

If this matter were one of first impression I could easily reach the conclusion that the immunity statute in question is in effect a circuitous attempt to circumvent the Constitution by a short-cut legislative statute amending the Fifth Amendment. However, it would appear that the authorities support the contention that Congress has the power to compel testimony by the enactment of an immunity statute which provides an immunity co-extensive with privilege against self-incrimination. Brown v. Walker, 161 U. S. 591; Smith v. United States, 337 U. S. 137. Secondly, that being so, consistently it can be argued that the statute is not invalid for failure expressly to grant immunity from state prosecution. United States v. Murdock, 284 U. S. 141; Feldman v. United States, 322 U. S. 487. See also Jack v. Kansas, 199 U. S. 372.

The good faith of the Attorney General when he acts under Section 3486 (c) should be assumed.

[fol. 78] In United States Court of Appeals for the Second Circuit

United States of America, Plaintiff-Appellee,

v.

William Ludwig Ullman, Defendant-Appellant

Judgment, April 4, 1955

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

[fol. 79] [File endorsement omitted.]

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] Supreme Court of the United States, October Term, 1954

No. 763

[Title omitted]

Order Allowing Certiorari—Filed June 6, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.